Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–1165 OF 2004 AND W-02–700 OF 2005

ZALEHA ZAHARI, KN SEGARA AND RAMLY ALI JJCA

17 MAY 2010

Civil Procedure — Costs — Appeal as to costs — Approach of appellate court — Whether appellate court should interfere with trial court's discretion in awarding costs — Circumstances when interference warranted

Civil Procedure — Costs — Principles — General rule on costs — Discretion of court when awarding costs, how exercised — Whether court entitled to review own order for costs — Whether order for costs rarely interfered with on appeal

Tort — Defamation — Libel — Advertisement — The 'ordinary, reasonable and fair minded reader' test, application of — Whether judge erred in applying his own perception in assessing impugned advertisement

The plaintiff's action for defamation against the defendants was dismissed in the High Court. The plaintiff's case was based on the use of her photograph in a bridal gown promotion-cum-advertisement ('the advertisement') published in the first defendant's magazine. The plaintiff complained that her photograph had been used without her consent and that the words in the advertisement had referred to her in a defamatory manner. The High Court held that the advertisement had not defamed the plaintiff and the plaintiff had in fact 'grossly distorted and exaggerated' the meaning of the words in the advertisement. In assessing costs, the judge initially ordered the first and second defendants to bear the plaintiff's costs on a 80:20 basis, and awarded the third defendant half costs. Subsequently, the judge ordered a review on the orders for costs. In this review, the judge made no order on costs against the first and second defendants and awarded the third defendant full costs. The net effect of this review was that the plaintiff was no longer entitled to costs from the first and second defendants, and was instead ordered to bear the full costs of the third defendant. The plaintiff filed two appeals to the Court of Appeal. The first appeal was against the High Court's dismissal of her action and the orders of costs. The second appeal concerned the High

Court's decision on its review on costs. The second defendant cross-appealed in the second appeal.

Held, dismissing the appeals with costs:

(1) In appraising the impugned advertisement, the High Court judge had applied his own perception and not the test of an 'ordinary, reasonable and fair minded reader'. It was pointless ordering a retrial as the Court of Appeal was in a position to apply the correct test — the 'ordinary, reasonable and fair minded reader' test — to the advertisement (see para 16).

(2) The Court of Appeal's application of the correct test — the 'ordinary, reasonable and fair minded reader' test — would result in the same conclusion as the High Court judge. The impugned advertisement was not defamatory of the plaintiff (see paras 18–19).

(3) Generally, costs follow the event. The successful party is entitled to be paid his costs except when it appears to the court that in the circumstances of the case, some other order should be made. An order can be reviewed on the judge's own motion or on the application of a party until such time the order has been perfected. The judge retains control over the case until the order giving effect to his judgment is formally completed (see para 26); *Chee Kuan Cheng v Chuo Kong Kah* [1967] 2 MLJ 74 (FC) referred; *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286 referred.

(4) An appellate court seldom interferes in the question of costs. The court below has absolute discretion in the matter, save that the discretion be exercised judiciously. In the instant case, there was no reason to interfere with the trial judge's orders on costs. He had exercised his discretion judiciously and fairly. The circumstances warranted depriving the first and second defendants of their costs and the third defendant being awarded full costs (see paras 27 & 30); *KE Hilborne v Tan Tiang Quee; Ks Chung v Tan Tiang Quee* [1972] 2 MLJ 94 referred; *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25 referred.

[Bahasa Malaysia summary

Tindakan plaintif untuk fitnah terhadap defendan-defendan ditolak di Mahkamah Tinggi. Kes plaintif adalah berdasarkan kepada menggunakan gambarnya dalam promosi merangkap iklan gaun pengantin ('iklan tersebut') yang diterbitkan dalam majalah defendan pertama. Plaintif mendakwa bahawa gambarnya digunakan tanpa kebenarannya dan bahawa ayat-ayat dalam iklan tersebut telah merujuk kepadanya dengan cara memfitnah. Mahkamah Tinggi memutuskan bahawa iklan tersebut tidak memfitnah plaintif dan dia sebenarnya telah 'grossly distorted and exaggerated' maksud

ayat-ayat dalam iklan tersebut. Dalam menaksir kos, hakim pada mulanya memerintahkan defendan pertama dan kedua menanggung kos plaintif dalam kadar 80:20, dan mengawardkan defendan ketiga separuh kos. Kemudian, hakim memerintahkan semakan atas perintah-perintah kos. Dalam semakan ini, hakim tidak membuat perintah kos terhadap defendan pertama dan kedua dan mengawardkan defendan ketiga kos penuh. Kesan jaringan semakan ini ialah plaintif tidak lagi berhak ke atas kos daripada defendan pertama dan kedua, malah diperintahkan menanggung kos penuh defendan ketiga. Plaintif memfailkan dua rayuan ke Mahkamah Rayuan. Rayuan pertama adalah terhadap penolakan tindakannya di Mahkamah Tinggi dan perintah-perintah kos. Rayuan kedua adalah berkenaan keputusan Mahkamah Tinggi atas semakan kos. Defendan kedua merayu balas dalam rayuan kedua.

Diputuskan, menolak kedua-dua rayuan dengan kos:

(1) Dalam menilai iklan yang dipersoalkan, hakim Mahkamah Tinggi telah menggunapakai persepsinya sendiri dan bukannya ujian 'ordinary, reasonable and fair-minded reader'. Adalah sia-sia memerintah perbicaraan semula kerana Mahkamah Rayuan boleh menggunapakai ujian yang betul, iaitu ujian 'ordinary, reasonable and fair-minded reader' ke atas iklan tersebut (lihat perenggan 16).

(2) Pengaplikasian Mahkamah Rayuan ke atas ujian yang betul, iaitu ujian 'ordinary, reasonable and fair-minded reader' akan memberi keputusan yang sama dengan hakim Mahkamah Tinggi. Iklan yang dipersoalkan tidak memfitnah plaintif (lihat perenggan 18–19).

(3) Amnya, kos menurut keadaan. Pihak yang berjaya berhak kepada kosnya kecuali apabila mahkamah mendapati bahawa dalam keadaan kes, perintah lain harus dibuat. Suatu perintah boleh disemak atas usul hakim itu sendiri atau atas permohonan pihak sehingga perintah tersebut telah muktamad. Hakim mempunyai kawalan ke atas kes tersebut sehingga perintah yang memberi kesan kepada penghakimannya telah sempurna (lihat perenggan 26); *Chee Kuan Cheng v Chuo Kong Kah* [1967] 2 MLJ 74 (MP) dirujuk; *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286 dirujuk.

(4) Mahkamah rayuan jarang mencampuri persoalan kos. Mahkamah bawahan mempunyai budi bicara sepenuhnya dalam perkara tersebut, dan budi bicara itu mestilah dilaksanakan dengan bijak. Dalam kes ini, tiada alasan untuk mencampuri perintah-perintah kos hakim bicara. Beliau telah melaksanakan budi bicaranya dengan bijak dan adil. Keadaan itu memerlukan defendan pertama dan kedua dinafikan kos mereka dan defendan ketiga diberikan kos penuh (lihat perenggan 27 &

30); *KE Hilborne v Tan Tiang Quee* [1972] 2 MLJ 94 dirujuk; *Petroliam Nasional Bhd & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25 dirujuk.]

Notes

For cases on appeal as to cost, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1888–1889.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

For cases on principles on costs, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2037–2053.

Cases referred to

Chee Kuan Cheng v Chuo Kong Kah [1967] 2 MLJ 74, FC (refd)

KE Hilborne v Tan Tiang Quee; Ks Chung v Tan Tiang Quee [1972] 2 MLJ 94, CA (refd)

Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25, SC (refd)

Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd [1984] 1 MLJ 286, FC (refd)

Legislation referred to

Rules of the High Court 1980 O 59 r 3(2)

Appeal from: Civil Suit No S4–23–63 of 1998 (High Court, Kuala Lumpur)

VK Lingam (Pradeep Kumar with him) (Syarikat KL Rekhraj) for the appellant.

Mah Weng Kwai (Raymond Mah with him) (Mah Weng Kwai Seow & Megat) for the first respondent.

Cheah Tien Eu (Suhaimi Khor Zulkifli & Chang) for the second and third respondents.

Zaleha Zahari JCA (delivering judgment of the court):

[1] In this judgment parties will be cited as they appear in the court below.

[2] We heard Appeal Nos W-02–1165 of 2004 (the 'first appeal') and W-02–700 of 2005 (the 'second appeal'), both filed at the instance of the plaintiff, together. The first appeal is against the decision of the High Court dated 18 August 2004 dismissing the plaintiff's claim and the order of costs pronounced. The second appeal is against the decision of the High Court judge dated 11 May 2005 in reviewing the order of costs pronounced on 18 August 2004. There is a cross-appeal by the first defendant in the second appeal.

[3] The unanimous decision of this court was to dismiss both appeals as well as the first defendant's cross-appeal. Our reasons are as follows.

THE CLAIM

[4] The first defendant is the publisher of 'FEMALE' magazine ('the magazine'). It ran a bridal gown promotion cum advertisement in its September 1995 issue. It was co-sponsored by the second defendant (who ran a bridal boutique called 'White and Lacy') and the third defendant (who ran a photo studio named 'TAG Studio').

[5] As the publication which is the subject matter of this appeal relates to the publication of a photograph and one paragraph in the said publication, sight of a copy of the impugned publication made available to us by the plaintiff's counsel at the hearing of these appeals was indeed of assistance to us in making a considered decision in these appeals. It is as follows:

[6] The impugned publication to an ordinary reader may be described thus: The photograph was that of a bride. A beautiful woman in a bridal gown with a veil over her head. The words 'A Special Night' appears prominently on the top of the page. The paragraph which the trial court and, on appeal, this court, is concerned with is the paragraph following the words 'A Special Night'. It reads as follows:

> Nothing could be more special than the night of your wedding. From the trousseau to your walk down the aisle, all eyes are turned to you, you'll want everything to be just right.

[7] Other than this paragraph, the contents of rest of the page consists of promotional statements of the co-sponsor, the second defendant and others with whom they are in association with in respect of hair styling and photography. The third defendant was expressly mentioned as the professional photographer with which 'White and Lacy' was associated with and the third defendant has been expressly named at the bottom of the page. There is then a description of the grand prize which the winner of the competition would win, as well as the format as to the details of entries to the competition.

[8] It has been conclusively proved that the photograph in the impugned publication is the plaintiff's photograph and its publication was without the plaintiff's consent. On the date of the impugned publication, the plaintiff was a government medical officer attached to the General Hospital Kuala Lumpur. The plaintiff commenced proceedings for defamation against the publisher as well as those named in the said publication. The plaintiff claimed that the said publication was defamatory and derogatory of her. That the said publication portrayed her to be a woman of loose morals; an unsuccessful doctor who had to resort to do part time modeling to supplement her income.

BACKGROUND

[9] The role played by the parties cited in the suit in the said publication was this.

[10] The third defendant had given two rejected prints of the plaintiff's (a client of his) photograph as a record of the design of the wedding gown for the second defendant's portfolio. The prints given were never intended for publication. The third defendant had no knowledge that the photograph given would be published. He also had no prior notice of the write up

A accompanying the photograph. The third defendant's involvement was only as a co-sponsor of the grand prize, ie, to provide photography shots to the winner to the competition.

B **[11]** The second defendant gave the plaintiff's photograph which he received from the third defendant to the first defendant. Between the first and second defendants, the evidence shows that both knew of the necessity to obtain the plaintiff's consent prior to its publication. Each blamed the other for the failure to obtain such consent prior to its publication.

C

WHETHER THE COMBINED EFFECT OF THE PHOTOGRAPH AND WRITE UP WAS DEFAMATORY OF THE PLAINTIFF?

D **[12]** In respect of the 'FEMALE' magazine generally, the judge was of the view there was 'nothing vulgar or sleazy' about this magazine. On the contrary the trial judge ruled that the magazine was 'a respectable magazine that caters to the needs and interests of women in general'.

E **[13]** The judge then made the following findings: The plaintiff's photograph as a bride in a wedding gown was not 'sexually provocative'. The photograph does not portray the plaintiff to be a woman of 'low character'. The write up accompanying the photograph, read in the context of a bridal promotion with reference to a special package co-sponsored by a bridal F boutique and a photography studio, did not relate to any immoral activity or lack of virtue on the part of the plaintiff. The judge was of the view that the plaintiff and her witnesses had 'grossly distorted and exaggerated' the meaning to be ascribed to the words in the first paragraph of the publication.

G **[14]** The judge then concluded that the said publication was not derogatory of the plaintiff. The plaintiff's claim against the defendants was then dismissed. On costs, as against the first and second defendants, the trial judge did not award them costs notwithstanding the fact that they had H successfully resisted the plaintiff's claim. He instead made the first and second defendants liable to bear the plaintiff's costs in the following proportion, 80% and 20%, respectively. In respect of costs of the third defendant, the trial judge considered it appropriate to only award him half costs. The plaintiff's appeal against this decision is the subject matter of the first appeal.

I **[15]** According to the plaintiff's counsel the trial judge had applied the wrong test. The judge had erred by applying his legal mind and by giving his own legal interpretation to the impugned publication/words instead of applying an 'ordinary, reasonable fair minded reader' test.

[16] From the judgment it does appear that in appraising the impugned publication the judge approached it from his own perception and not that of an 'ordinary, reasonable fair minded reader'. Be that as it may we are of the considered opinion that no useful purpose would be served by sending this case back for retrial. This court is in as good a position as the trial judge to apply the correct test and determine what is the effect of the photograph, and the meaning of the words complained of, to an 'ordinary reasonable fair minded reader' in the context in which it appeared.

[17] Applying the correct test to the photograph and the words complained of and giving them their natural and ordinary meaning in the context of a bridal promotion-cum advertisement-cum competition, and the prize the winner of the competition would win, in our considered opinion the said publication cannot and does not bear the meaning alluded to them by the plaintiff. The write up and photograph read in context meant simply this — a statement of fact that a wedding night was not an ordinary one, but a special one. The following words then invites a prospective bride to imagine herself walking down the aisle, the focus of attention of all those present, and the desire of such a prospective bride on such an occasion for everything to turn out perfect (from the trousseau to your walk down the aisle, all the eyes are turned to you, you'll want everything to be just right).

[18] Thus, the application of the correct test of an 'ordinary reasonable fair minded reader', results in the same conclusion as the learned trial judge. The impugned publication was not derogatory of the plaintiff. We agree with the finding of the trial judge that there was no basis whatsoever to draw an inference that the person photographed was not successful in the profession she was in. We agree with the trial judge that the write up certainly does not give rise to a suggestion that the person in the bridal gown was a person who 'encouraged and/or condoned immoral activities and was lacking in virtue'. The suggestion that the said publication gives rise to an implication that the person photographed did so 'to supplement her income' was indeed far fetched. A single appearance in a magazine certainly does make one a 'model'.

[19] In view of our decision being in accord with that of the trial judge, that the impugned publication was not defamatory of the plaintiff, the decision of learned judge dismissing the plaintiff's claim was accordingly affirmed.

COSTS

[20] As earlier stated in this judgment, although the first and second defendants had successfully resisted the plaintiff's claim, the trial judge had by order dated 18 August 2004, deprived them of their costs. They were

instead made jointly liable to bear the plaintiff's costs on an 80:20 basis. As for the third defendant, who had also successfully resisted the plaintiff's claim, he was only awarded half costs. In short, on the facts and circumstances of this case the learned High Court judge deemed it fit, in exercise of his discretion, to depart from the general rule of 'costs following the event'.

[21] A trial judge certainly has the power to make such an order, for costs not to follow the event, by reason of the express words 'except where it appears to the court that in the circumstances of the case some other order should be made' in O 59 r 3(2) of the Rules of the High Court 1980.

[22] The record shows that less than three weeks after delivering the decision on 18 August 2004, vide letter dated 6 September 2004, parties were notified of the judge's intention to review the order of costs made against the third defendant and to appear before him on 14 September 2004. It would thus appear that having made the order on costs which he did, the trial judge had second thoughts in awarding the third defendant only half costs instead of full costs. The record shows that the first and second defendants, by their respective letter dated 13 September 2004, seized this opportunity to also apply to the High Court judge to review the order of costs made against them.

[23] Parties were given the fullest opportunity to submit before the trial judge on whether the order as to costs pronounced on 18 August 2004 should be reviewed. The judge took the position that he had the power to review the earlier order on costs. The third defendant who was awarded half costs was then awarded full costs. As for costs against the first and second defendants, the High Court judge maintained his earlier stand that they were not entitled to costs. Be that as it may, he deemed it fit to review the order on costs against them. Instead of being jointly liable to pay the plaintiff's costs on 80:20 basis, he made no order as to costs as against the first and second defendants. The net effect of this review was, the plaintiff was no longer to receive costs of the suit from the first and second defendants, and to bear the full costs of the third defendant.

[24] The plaintiff's counsel submitted that the High Court judge had no power to review the order of costs pronounced on 18 August 2004. Having made the order which the learned judge did, he was functus officio. He further submitted that the court should not have entertained the first and second defendants' application to review the order of costs made against them. An aggrieved party dissatisfied with any order made against them must do so by way an appeal to the Court of Appeal.

[25] Counsel for the first defendant submitted there was no compelling reason to depart from the general principle, upon dismissal of the plaintiff's claim, that costs follow the event pursuant to O 59 r 3(2) of the Rules. Substantial work, time and effort had been expended by the first defendant to defend the suit. There were no compelling reason why costs should not be awarded to the first defendant. The second defendant's counsel adopted this submission.

[26] Our decision on the appeal in respect of the order on costs are as follows: We agree that the general principle envisaged by the rules is for costs to follow the event; that the successful party is entitled to be paid his costs except when it appears to the court that, in the circumstances of the case, some other orders should be made. We accept the proposition that an order can be reviewed on the judge's own motion or on the application of a party until such time as the order has been perfected. The judge retains control over the case until the order giving effect to his judgment is formally completed (see *Chee Kuan Cheng v Chuo Kong Kah* [1967] 2 MLJ 74 at p 75 (FC); *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286 at p 292).

[27] An appellate court seldom interfere in the question of costs, and if they do so, it is done reluctantly. This is because the court below has an absolute discretion except that that discretion must be exercised judicially. Wee Chong Jin CJ in *KE Hilborne v Tan Tiang Quee; Ks Chung v Tan Tiang Quee* [1972] 2 MLJ 94 said:

> It has long been well settled that costs are in the discretion of the court. It has also long been well settled that an appellate tribunal is not entitled to interfere with a discretion exercised by a lower court unless it is clearly shown that the discretion has been exercised on wrong principles ...

[28] In *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25 at p 25, the Supreme Court ruled that the grounds under which the exception conferred under O 59 r 3(2) of the Rules is to be exercised must be grounds connected to the cause of action.

[29] In the present case the learned judge in refusing costs to the first and second defendants held:

> In my judgment, in the present case, on the issue of costs, there are special grounds connected with the cause of action. The cause of action concerned the unauthorised publication of the plaintiff's photograph in a magazine meant for public circulation. To my mind, it was unethical and morally wrong for the first and second defendants to have published the plaintiff's photograph for the purpose of their commercial promotion without her consent. It was unwarranted invasion

of the plaintiff's privacy. It is unfortunate for the plaintiff, that the law of this country, as it stands presently, does not make an invasion of privacy an actionable wrongdoing (it is actionable under the law of some other jurisdictions, for example, in the United States).

[30] We see no reason to interfere with the trial judge's discretion in reviewing the order on costs and in making the order as to costs which he did. It has not been shown that there has been an error of law, or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action. We are satisfied that the trial judge had exercised his discretion judiciously and fairly. We agree that the circumstances of this case warrant depriving the first and second defendants of their costs, and the third defendant being awarded full costs.

[31] For the above reasons the unanimous decision of this court was to dismiss the first appeal with costs. The deposit to be divided equally between the defendants/respondents to account of costs. As for the second appeal, as against the first and second defendants/respondents, the appeal was dismissed and the first defendant's/respondent's cross-appeal was also dismissed. The second appeal as against the third defendant/respondent was also dismissed. The decision of the High Court on costs as varied by order dated 11 May 2005 was affirmed. It is further ordered in respect of the second appeal that there be no order as to costs. The deposit to be refunded to the plaintiff.

Appeals dismissed with costs.

Reported by Andrew Christopher Simon